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In the

Supreme Court of the United States

October Term, 1996

ALLEN MORGAN, SUPERINTENDENT OF KNOX COUNTY SCHOOLS,
Petitioner,

v.

CHRIS L., A MINOR, by his next friend, MIKE L.,
Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION AND BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The National School Boards Association (NSBA) moves this Court for leave to participate as *amicus curiae* herein, for the purpose of filing the attached brief in support of the Petition for Writ of *Certiorari*. Petitioner has consented to the filing of the brief. Respondents have refused consent. Copies of Petitioner's consent

and Respondents' refusal to consent are on file with the Clerk of this Court.

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands, Guam and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents the nation's 95,000 school board members, who, in turn, govern 15,173 local school districts that serve more than 40 million public school students -- approximately 90 percent of all elementary and secondary students in the nation.

Each of the school districts which NSBA represents receives or is eligible to receive financial assistance under the Individuals with Disabilities Education Act 20 U.S.C. § 1401 *et seq.* (IDEA or the Act). The ruling in this case sets a precedent which, if followed in other circuits, would seriously undermine the ability of schools to maintain a safe environment for all students.

The National School Boards Association urges this Court to

grant it leave to present its views.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

INTEREST OF *AMICUS*

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents the nation's 95,000 school board members, who, in turn, govern 15,173 local school districts that serve more than 40 million public school students -- approximately 90 percent of all elementary and secondary students in the nation.

Each of the school districts which NSBA represents receives or is eligible to receive financial assistance under the Individuals with Disabilities Education Act 20 U.S.C. § 1401 *et seq.* (IDEA or the Act). The subject of this case is of great importance to school districts across the country.

STATEMENT OF ISSUES

Whether the filing of a petition with the juvenile justice system after a disabled student commits a crime on school property,

is a "change in placement" under the Individuals with Disabilities Education Act (IDEA).

ARGUMENT

I. Introduction.

The decision of the court of appeals in this case has no support in the Act and seriously undermines the safety of public school children across the country. Neither the Act nor this Court's decision in *Honig v. Doe*, 484 U.S. 305 (1988), construing § 1415(e)(3), supports the proposition that a school district referral to the juvenile justice system is an unlawful unilateral "change of placement."

The decision in this case may appear benign at first look because the offense committed by the student involved simple vandalism of school property. However, if the school district's action in this case implicates IDEA rights, then the IDEA is also implicated by a call to the police when a student brings an Uzi to school and starts shooting people. There is no legal difference for IDEA purposes between the initiation of a juvenile justice proceeding by

filing a formal complaint with the juvenile justice system or by initiating such a proceeding by invoking the criminal justice system through a call to the police that ends in ultimate transfer of the case to the juvenile court.

The decision below lacks any support in reason and sets a dangerous precedent.

II. The "stay put" provision does not apply to the criminal justice or juvenile justice systems, regardless of whether a criminal or juvenile proceeding is initiated by the school district.

Section 1415 of IDEA is the procedural safeguards section of the Act. It requires that school districts allow parents to examine records relating to the evaluation and placement of their child, notify parents of a proposed initiation or change in placement of the child and give parents the right to an impartial due process hearing where there is a dispute relating to the identification, education program or placement of the child. Section 1415(e)(3)(A) is the so called "stay put" provision. It reads as follows:

> Except as provided in subparagraph (B) [relating to students who bring weapons to school], *during the pendency of any proceedings conducted pursuant to*

> *this section*, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed. [Emphasis supplied.]

Under this Court's decision in *Honig v. Doe*, *supra*, a school district may temporarily suspend a disabled student from school for up to 10 days without violating the Act, but a longer suspension constitutes a "change in placement" subject to the proscriptions of § 1415(e)(3)(A).

The issue in the instant case is whether the action of a school employee in filing a complaint with the juvenile justice system is a "change in placement" under § 1415(e)(3). The court of appeals answered in the affirmative and *amicus* respectfully disagrees.

In 1988 this Court was asked, in the case of *Honig v. Doe*, to hold that Congress did not intend to apply § 1415(e)(3) (the "stay put" provision) to disciplinary proceedings, at least where the conduct of the student poses a danger to other students. The plaintiffs in the case were two seriously emotionally disturbed students whom the school

district expelled from school for violent and disruptive conduct. This Court refused to "rewrite" the statute to carve out a "dangerousness" exception, stating that the statute "means what it says."

One of the issues raised in *Honig* is analogous to the issue here, that is whether the "stay put" provision precludes a court from temporarily enjoining a dangerous disabled student from attending school. The Court ruled that nothing in the Act precludes a school district, during the permitted ten day suspension period, from applying to a court for injunctive relief as deemed appropriate by the court. This Court said that § 1415(e)(3) "says nothing whatsoever about judicial power."

> As the EHA's [Education of the Handicapped Act, the IDEA's predecessor] legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by *schools*, not courts, and one of the purposes of § 1415(e)(3), therefore was to prevent *school* officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings. [Emphasis in the original.]

Although under the *Honig* ruling a school can suspend a disabled child from school for only up to 10 days *on its own*, the Court upheld

the right of the district to apply to a court to remove the child for a longer period. Similarly, in this case the school district cannot suspend the child from the school for more than 10 days without following the administrative procedures of the Act, but it can petition the juvenile justice system to take whatever action is deemed appropriate by the juvenile justice officials.

The Court of Appeals decision states that "the ALJ and the district court simply require that schools contemplating juvenile petitions do what the IDEA requires of them." *Amicus* does not disagree with the court that the school district must comply with the IDEA, but that is not what the courts below are requiring the school district to do. They are interfering with the orderly administration of the juvenile justice system of a state. If the child is incarcerated by the juvenile justice system, that is the action of that system, not the school district. As in *Honig*, the fact that the court or juvenile authority is petitioned by the school district to take action, is not relevant. If the removal from school is through the *unilateral* action of the school district in suspending the student from school, that does

constitute a "change in placement." If the removal is through the action of the police, a criminal court or a juvenile court at the behest of the school district that *bilateral* action is not a "change in placement."

In *Honig*, the U.S. Supreme Court refused to read a "dangerousness" exception into the Act on the ground that the "language of § 1415(e)(3) is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardians of a disabled child otherwise agree, 'the child *shall* remain in the then current educational placement.' [Emphasis in the original.]" 484 U.S. at 323. Reading the "stay put" provision in the context of the facts in this case, the language is equally unequivocal that the "stay put" provision is not even implicated unless proceedings must be "initiated under the Act." Here the proceedings, if any, were instituted under Tennessee's juvenile justice code. Furthermore, the placement referred to in § 1415(e)(3) is the "educational" placement, not where the student is placed by police or juvenile justice authorities. Even if

the school officials' petition to the juvenile justice authorities was motivated by a desire to subvert the change in placement provision of the IDEA, that fact is irrelevant because the action was not "initiated under the Act." That does not suggest that a school district can file a petition in the juvenile court or call the police and then wash its hands of the student. The school district retains its obligations under the IDEA even if the juvenile court takes jurisdiction under the applicable juvenile statute. Juvenile court proceedings and proceedings under the IDEA are separate and may in some circumstances run concurrently.

The proscription in *Honig* against disciplinary changes in placement is directed toward "unilateral" changes in placement. The school district has no power to place the child in a juvenile or penal facility. Its only *unilateral* power relates to placement in or removal from an educational facility.

III. Congress recognized when it passed the Goals 2000 legislation the importance of juvenile justice proceedings in dealing with violence in the schools.

Goal Six of the National Education Goals adopted by the Nation's Governors in 1990 states "By the year 2000 every school in America will be free of drugs and violence and will offer a disciplined environment conducive to learning." A major education initiative of the Clinton administration was "Goals 2000: Educate America Act." P.L. 103-227. Title VII of the Act, entitled "Safe Schools," is designed to help schools achieve Goal Six. Recognizing the relationship between juvenile justice referrals and safe schools, Congress established as one of the criteria for determining eligibility for funding under the Safe Schools title in Goals 2000 that school districts serve an area with a "high rate of ... referrals of youth to juvenile court."

In 1994 Congress passed "Improving America's Schools Act of 1994," part of which reauthorized the Elementary and Secondary Education Act (ESEA), the premier federal funding program for local school districts. A new provision in ESEA states:

> No funds shall be made available under this Act to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who

> brings a firearm or weapon to a school served by such agency.

Sec. 14602, P.L. 103-382, 108 Stat. 3408.

Another provision in the Improving America's Schools legislation requires states to adopt laws calling for the expulsion of any student who brings a gun to school. (This provision is entitled the Gun Free Schools Act. Sec. 14601, P.L. 103-382, 108 Stat. 3407.) Congress understood the implications of the Gun Free Schools Act on IDEA and included exceptions for disabled children and amended IDEA to allow temporary changes in placement. However, the requirement on referrals to the criminal or juvenile justice systems applies to all students, including those who are disabled, because Congress recognized that such referrals do not conflict with the requirements of the IDEA and, therefore, there was no need to include an exception for disabled students.

IV. School officials have a responsibility to protect all the children within their care from an unfortunate, but real, rising tide of violence in the schools.

The instant case poses a difficult problem with which school districts must contend on a daily basis. The facts presented in this

case are not unusual; similar situations arise every day in school districts across the country. Although the offense involved in this case is one against school property, the principle established by the decision below would apply equally where a disabled student committed an act of violence against another student or a school employee.

The court of appeals held that a school district's referral of a child to the police or juvenile authorities constitutes a "change in placement" under § 1415 of the IDEA. Over 5 million children, about 11 percent of the school age population,* were classified as "disabled" in school year 1992-93, according to the U.S. Department of Education, and the special education population continues to grow. *To Assure the Free Appropriate Public Education of All Children with Disabilities*, Sixteenth Annual Report to Congress on the Implementation of The Individuals with Disabilities Education Act 1994, 7. According to the Department, the biggest increases over

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*The 1993 census shows that a total of 46,337,000 children ages 6-17 reside in this country. Annual Report to Congress, *id* at A-270.

the years have been in the number of children identified with specific learning disabilities. Students covered by the Act and by the court of appeals ruling below include both those with learning disabilities such as a minor speech impediment, and those with serious emotional disorders who are more prone to acts of violence. The Department reported that most students were served in the regular class (34.9 percent) or in a resource room (36.3 percent) and an additional 23.5 percent were served in separate classes within regular school building. Therefore, a majority of the public school students are placed at risk by a rule which, in effect, prohibits schools from calling the police in emergency situations involving disabled students. The report also showed that 20 percent of the students with serious emotional disorders are arrested at least once before they leave school and 35 percent are arrested within a few years of leaving school. *Id* at 110. Under the rule established by the court of appeals, these arrests could not be at the instance of a call from a school district official.

These statistics demonstrate that the rule adopted by the court below could adversely affect the safety of our nation's schools. The decision exempts disabled students from referrals to juvenile justice system for crimes committed while in school. As shown above, most disabled students are educated in the regular school so both disabled and non-disabled students are at risk. *Amicus* is not supporting the denial of a "free appropriate public education" to disabled children. Were this court to reverse the lower court's decision, the obligation of the school district to educate Chris L would remain. Even were he placed by the juvenile justice system in a juvenile facility, Chris L would still be entitled to educational services.

Unfortunately, acts of violence in our schools, like on our streets, are no longer rare. According to a survey conducted by the U.S. Department of Justice's Bureau of Justice Statistics, 37 percent of all violent crimes committed against teenagers occur at school. *Teenage Violence: A National Crime Survey Report* 5, 8 (May 1991). A recent study conducted by the Office of Juvenile Justice and Delinquency Prevention showed that the number of juvenile court

cases involving serious crimes from 1988 to 1992 rose by 26 percent to 1.5 million; aggravated assault cases increased by 80 percent; homicide increased by 55 percent; robberies went up by 53 percent and forcible rape cases increased 27 percent. School Safety Update, 5 (National School Safety Center News Service) November, 1994. More than four out of five of all school districts -- from urban, suburban, and rural areas -- responding to a National School Boards Association (NSBA) survey in 1993 believed that the problem of school violence was worse than during the previous five years -- and 35 percent of respondents believed that school violence has "increased significantly." *Violence in the Schools: How America's School Boards Are Safeguarding Your Children*, 3 (1993). Seventy-eight of the responding school districts reported that they had experienced student assaults on students. Not only is the number of incidents on the increase, but school districts reported that the severity of the violence has also increased.

V. The rule adopted by the district court would make it impossible for school districts to protect the students in their care from acts of violence by disabled students.

Although the instant case involves a crime against property, the rule prohibiting the filing of a juvenile court petition would apply to *any* referral to juvenile authorities, whether directly or indirectly. The laws of Tennessee and, indeed, the laws of states across the country, require juveniles who are arrested by the police for what would be a crime if committed by an adult, to be referred to the juvenile justice system. *See, e.g.* Ohio Rev. Code Ann. § 2151.0l *et seq.*, Ky Rev. Stat. Ann. § 640 *et seq.*, Mich. Stat. Ann. § 27.3178 *et seq.*

In Tennessee juveniles are required to be transferred to juvenile court, regardless of the violation. The juvenile court has exclusive jurisdiction over certain proceedings, including proceedings in which a child is alleged to be "delinquent, unruly or dependent and neglected or to have committed a juvenile traffic offense. . ." Tenn. Code Ann. § 37-1-103(1). Courts with jurisdiction over criminal proceedings are required, where it appears that the defendant is a child, to "forthwith transfer the case to the juvenile court." Tenn.

Code Ann. § 37-1-109. Finally, Tenn. Code Ann. § 37-1-113 provides:

> (a) A child may be taken into custody:
> (1) Pursuant to an order of the court under this part [juvenile court]
> (2) Pursuant to the laws of arrest;
> (3) By a law enforcement officer social worker of the department of human services, or duly authorized officer of the court, if there are reasonable grounds to believe that the conditions specified in § 37-1-114(a)(2) [delinquency etc.] exist; or
> (4) By a law enforcement officer or duly authorized officer of the court if there are reasonable grounds to believe that the child has run away from his parents, guardian or other custodian.
> (b) The *taking of a child into custody is not an arrest*, except for the purpose of determining its validity under the Constitution of Tennessee or the Constitution of the United States. [Emphasis supplied.]

Thus, the result in Tennessee and in other states across the country is the same whether the child comes to the juvenile justice system through the filing of a petition alleging delinquency as in this case or through a call to the police who takes the child into custody for a criminal violation and then the criminal courts transfer the child to the juvenile court. Under the rule established in the decision below, if a student is holding another student or a teacher at gunpoint or a serious

gang fight involving disabled students breaks out in the school, school officials would be in violation of the IDEA if they called the police because the student may ultimately be incarcerated.

In districts that have their own security force, the situation is potentially even more difficult. The Los Angeles Unified School District, for example, has its own police department and the police officers in the schools are authorized under California law to make arrests, carry weapons and, in general, function like regular police officers. Los Angeles Unified School District developed the first school district, police-administered crime prevention program in the country that has become a model for other school district security systems. *Mitchell directs community policing in L.A. schools.* School Safety Update, 5 (National School Safety Center News Service) April 1992. Other states also authorize schools to hire police departments. According to the National Alliance for Safe Schools, 237 school districts in 37 states and the District of Columbia have their own public school police or security operations. J. Brockett, "Growing number of districts adding police officers to staff," *School*

Board News, May 11, 1993. As of 1993, forty-six school districts in Texas had their own full-time police departments. Badges in the Halls, Dallas Morning News, October 18, 1993 at 1. Under the court of appeals rule in this case these school district police officers could not arrest a disabled student observed committing a crime. Apparently, the police officer would have to make a determination on the spot as to whether the child is disabled and, if so, could not arrest the child.

CONCLUSION

It is unclear from the decision below whether the school district complied with the IDEA requirements relating to assessment, evaluation, development of an individualized education plan and notice. The only issue before the ALJ and the courts below was whether the filing of a juvenile court petition was a "change in placement." *Amicus* respectfully requests this Court to grant the petition in this case and reverse the decision below and hold that there was no unlawful "change in placement" in this case. If the allegations made by the parents in the district court are correct regarding the

school district's default in its obligations under the Act, the parents continue to have the right to seek redress on those issues. The narrow issue here, however, is not covered by the IDEA.

Respectfully submitted,

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